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Supreme Court of the United States

OCTOBER TERM, 1967

No. 515

W. E. B. DUBOIS CLUBS OF AMERICA; BROOKLYN DUBOIS CLUB; CHICAGO WESTSIDE DUBOIS CLUB; SAN FRANCISCO CITYWIDE DUBOIS CLUB; HUGH FOWLER; TERENCE HALLINAN; JOSE RISTORICCI; DONNA ALLEN; REV. JAMES BEVEL; REV. WILLIAM S. COFFIN; DAVE DELLINGER; RALPH DI GIA; FRANK EMSPAK; PROF. ROBERT J. HAVIGHURST; PROF. STAUGHTON LYND; JOHN LEWIS; CARL OGLESBY; REV. JOSEPH SITTLER; ELIZABETH SUTHERLAND; NORMAN THOMAS; DAGMAR WILSON,

Plaintiffs-Appellants,

—against—

RAMSEY CLARK, Attorney General of the United States; JOHN M. MAHAN, Chairman, and JOHN S. PATTERSON, SIMON MCHUGH, LEONARD L. SELLS and EDWARD C. SWEENEY, all members of the Subversive Activities Control Board,

Defendants-Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

DAVID REIN
711 Fourteenth St., N.W.
Washington, D.C.

MONROE H. FREEDMAN
1424 Sixteenth St., N.W.
Washington, D.C.

FLOYD MCKISSICK
414 West 149th Street
New York, N. Y.

WILLIAM M. KUNSTLER
ARTHUR KINOY
511 Fifth Avenue
New York, N. Y.

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y.

PATRICK SARSFIELD HALLINAN
345 Franklin Street
San Francisco, California

Attorneys for Plaintiffs-Appellants

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Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

W. E. B. DUBOIS CLUBS OF AMERICA, etc. *et al.*,

Plaintiffs-Appellants,

—against—

RAMSEY CLARK, etc. *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

A. *The Opinions Below*

The *per curiam* opinion of the statutory three-judge United States District Court for the District of Columbia, which has not yet been officially reported, is set forth in full as Appendix A to this statement.

B. *Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked*

1. This is an appeal from a *per curiam* opinion and order of a three-judge Federal District Court convened pursuant to Title 28 U. S. C. §§2282 and 2284. The appellants instituted an action on April 26, 1966, challenging the constitutionality of and seeking an injunction restrain-

ing the enforcement of the Subversive Activities Control Act of 1950 (hereinafter sometimes referred to as the Act)[1] and in particular §7(b), (c) and (d) thereof[2] (hereinafter sometimes referred to as the Communist-front provisions), and seeking equitable and declaratory relief to protect federally guaranteed constitutional rights. Jurisdiction of the court below was based on Title 11, §521, D. C. Code, Title 28 U. S. C. §§2201 and 2282.

A three-judge district court was thereupon duly appointed by the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit.[3] On April 18, 1967, the Court rendered a written opinion granting appellees' motion to dismiss the complaint (Appendix A).

The order of the three-judge Court dismissing the complaint was duly entered on May 5, 1967. On June 12, 1967, it unanimously granted a motion by appellants for an order staying further proceedings by the Subversive Activities Control Board (hereinafter sometimes referred to as the SACB) against appellant the W. E. B. DuBois Clubs of America (hereinafter sometimes referred to as the DuBois Clubs) pending the disposition of this appeal. A Notice of Appeal was duly filed on June 5, 1967. On July 28, 1967, Associate Justice Byron R. White granted a motion by appellants to extend their time in which to file this jurisdictional statement until August 18, 1967.

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[1] 64 Stat. 987-1005, 50 U. S. C. 781-98.

[2] 50 U. S. C. 786(b), (c) and (d).

[3] In granting appellants' motion for an order certifying the necessity of convening a three-judge Court, District Judge William B. Bryant concluded "that the constitutional question raised by the plaintiffs is not patently frivolous." At the same time, he denied appellees' motion to dismiss the complaint.

2. Jurisdiction of this appeal is conferred on this Court by Title 28 U. S. C. 1253.

3. Cases sustaining the jurisdiction of this Court are: *Stafford* v. *Wallace*, 258 U. S. 495; *Coleman* v. *McGrath*, 342 U. S. 580; *Dombrowski* v. *Pfister*, 380 U. S. 479.

4. The validity of §7(b), (c) and (d) of the Subversive Activities Control Act of 1950, as amended, is here involved. The text of this Act of Congress is as follows:

Sec. 7. • • •

(b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

(c) The registration required by subsection (a) or (b) shall be made—

(1) in the case of an organization which is a Communist-action organization or a Communist-front organization on the date of the enactment of this title, within thirty days after such date;

(2) in the case of an organization becoming a Communist-action organization or a Communist-front organization after the date of the enactment of this title, within thirty days after such organization becomes a Communist-action organization or a Communist-front organization, as the case may be; and

(3) in the case of an organization which by a final order of the Board is required to register, within thirty days after such order becomes final.

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

(1) The name of the organization and the address of its principal office.

(2) The name and last-known address of each individual who is at the time of filing of such regis- at any time during the period of twelve full calendar months next preceding the filing of such statement, an officer of the organization, with the designation or title of the office so held, and with a brief statement of the duties and functions of such individual as such officer.

(3) An accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which expended) by the organization during the period of twelve full calendar months next preceding the filing of such statement.

(4) In the case of a Communist-action organization, the name and last-known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

(5) In the case of any officer or member whose name is required to be shown in such statement, and who uses or has used or who is or has been known by more than one name, each name which such officer or member uses or has used or by which he is known or has been known.

C. ***Questions Presented by This Appeal***

1. Whether the provisions of the Subversive Activities Control Act of 1950, 50 U. S. Code §§781ff, relating to the registration of alleged Communist-front organizations are unconstitutional on their face because they conflict with Article I, §9, Clause 3, Article III, and the First, Fifth, Sixth, Ninth and Tenth Amendments of the Constitution of the United States?

2. Whether the provisions of the Subversive Activities Control Act of 1950, 50 U. S. Code §§781ff, relating to the registration of alleged Communist-front organizations are unconstitutional as applied to appellants because, as applied, they conflict with Article I, §9, Clause 3, Article III, and the First, Fifth, Sixth, Ninth and Tenth Amendments of the Constitution of the United States?

3. Whether the complaint herein states a cause of action for equitable relief restraining the enforcement of these unconstitutional provisions prior to the exhaustion of administrative proceedings where the statute on its face and as applied and the administrative proceedings themselves create a chilling effect upon the exercise of First Amendment rights under the principles established in *Dombrowski* v. *Pfister*, 380 U. S. 479.

4. Whether the complaint herein states a cause of action for a judgment declaring the unconstitutionality of the aforesaid provisions prior to the exhaustion of administrative proceedings where the statute on its face and as here applied and the administrative proceedings themselves create a chilling effect upon the exercise of First Amendment rights under the principles established in *Dombrowski* v. *Pfister,* 380 U. S. 479.

5. Whether the District Court erred in dismissing the complaint on the ground that plaintiffs-appellants are required to exhaust their administrative remedies.

D. *Statement of the Facts of the Case*

Appellant DuBois Clubs is an unincorporated membership association of young American men and women of all races and religious beliefs, between the ages of fourteen and thirty-five, the majority of whom are of college age. Formed in San Francisco, California, in June of 1964, it was named after Dr. W. E. B. DuBois, the famous Negro humanitarian and scholar who was instrumental in the founding of the National Association for the Advancement of Colored People. Its national office and main place of business is now located in Chicago, Illinois. Appellant Hugh Fowler, its National Chairman in March of 1965, is presently a member.[4]

[4] Appellant Terence Hallinan, the DuBois Clubs national secretary in March of 1965, is presently a member; appellant Jose Ristoricci was then, and still is, its New York and East Coast Coordinator. Appellants Brooklyn DuBois Club, Chicago West Side DuBois Club and San Francisco Citywide DuBois Club are three of its local chartered affiliates. The remaining appellants are fourteen American citizens wholly unconnected with the DuBois Clubs or any of its local affiliates but whose First Amendment rights were adversely affected by the events hereinafter set forth.

The primary objective of the DuBois Clubs is to contribute toward the building of a society whose material benefits are available on the basis of need, not privilege, where every person will have a voice in government without regard to race, creed, religion or economic status, where education for all is encouraged and paid for by the government, where no one who wants to work is idle and where people can plan their future free of the threat of war. The DuBois Clubs believe and advocate that these results may best be achieved through a socialist form of society. The DuBois Clubs are independent of any parent organization and are free from political obligations to any political party in this country or abroad. The policy of the DuBois Clubs is that membership is open to every young person who shares its goals, regardless of political point of view, race, creed or color.

The DuBois Clubs are dedicated to the defense and preservation of the fundamental liberties and freedoms of the American people as embodied in the Constitution of the United States and, in particular, in the Bill of Rights. Among these things, they are striving for (a) racial freedom and equality throughout the United States; (b) the termination of the present war in South Viet Nam; (c) an end to economic deprivation among large sectors of the American community, and (d) the creation of jobs and job training opportunities. To these ends, they seek to utilize to the fullest extent the fundamental democratic liberties of freedom of speech, freedom of press, freedom of association and the right peaceably to assemble and petition the Government for redress of grievances, all of which are guaranteed by the First Amendment to the Constitution of the United States.

The DuBois Clubs are a self-governing, wholly independent association of young Americans. All policies, programs and other decisions are made solely by the membership of the DuBois Clubs in accordance with democratic procedures. The highest governing body is the national convention. In the interim between conventions the highest policy making body is the national committee of the DuBois Clubs. Individual clubs are organized in local communities throughout the nation. These local clubs conduct activities in their local communities consistent with the national program and objectives of the DuBois Clubs as set forth herein, as well as in response to the social, cultural, economic and political needs of the young people in the communities in which they exist.[8]

On March 4, 1966, the Attorney General caused to be filed with appellee SACB members a petition (hereinafter sometimes referred to as the Attorney General's petition) seeking to force the DuBois Clubs to submit to punitive registration as a "Communist-front organization" pursuant to §§7(b), (c) and (d) of the Act, *supra*. The petition alleged that the DuBois Clubs was dominated and controlled by the Communist Party. It further alleged that it had engaged in various activities such as protest marches, picket lines, publication and distribution of leaflets and other literature and had adopted views which, according to the Attorney General, were similar to positions adopted by the Communist Party on such questions as the cessation of nuclear testing, opposition to colonial and neo-colonial exploitation, institution of diplomatic relations with the

[8] The foregoing elaboration of the organization and objectives of the DuBois Clubs and its local chartered affiliates is extracted from the complaint herein.

Peoples Republic of China and with Cuba, the admission of China to the United Nations, the removal of the U. S. Naval Base from Guantanamo, and the lifting of travel bans to Cuba, China and North Viet Nam (Appendix B, *infra*, pp. 10a-11a).[6] There is no question that the activities charged by the Attorney General to the DuBois Clubs are all activities protected by the First Amendment since they all involve acts of speech, assembly and press.

At the same time, the Attorney General issued an inflammatory and provocative press statement which announced the filing of said petition and stated that this action had been the result of "extensive FBI investigation". The DuBois Clubs was described as "a Marxist youth organization created and controlled by the Communist Party, U. S. A. [with] . . . a substantial number of the group's officers . . . are members of the Communist Party and 'subject to its discipline' ".

This press statement resulted in widespread newspaper, radio and television publicity throughout the United States. The day after its release, bombs totally destroyed the national headquarters of the DuBois Clubs, then located in San Francisco, California. Hours later, members of the Brooklyn DuBois Club, who had peacefully assembled in their headquarters in New York City to protest the filing of the petition and the provocative nature of its accompanying press statement were attacked and beaten by persons whose identity was not known to them.

Since the filing of the Attorney General's petition, DuBois Clubs has undergone further physical attacks,

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[6] Significantly, the major current DuBois Clubs activity, opposition to American military involvement in South Viet Nam, was not included in the Attorney General's enumeration of its views.

extensive harassment and continuous adverse publicity. For example, on July 28, 1966, its national office in Chicago, Illinois, was broken into and its key financial and membership records stolen. Many colleges and universities have refused to permit its local chartered affiliates to be organized or to function on their campuses or made it extremely difficult and/or onerous for them to do so.

The petition also resulted in the marked curtailment of the activities of the DuBois Clubs since large numbers of individuals otherwise disposed to participate in or to contribute to the Clubs have refused to do so because of the pending action before the SACB.

Eight weeks after the filing of the Attorney General's petition, appellants turned to the federal courts for protection against this serious and imminent threat to their fundamental constitutional rights. They sought, *inter alia*, permanent and interlocutory injunctive relief restraining the enforcement of the Communist-front provisions of the Act as unconstitutional on their face and as applied. In due course, a three-judge District Court was convened, after which appellants moved for a temporary injunction and appellees for an order dismissing the complaint for failure to state a cause of action.

On January 21, 1967, the three-judge court heard argument addressed solely to the question of the facial constitutionality of the Communist-front provisions. On April 18, 1967, it announced that it declined to act on the constitutional issues presented, under the conclusion that the complaint failed to state a cause of action for relief. In so doing, it held that appellant DuBois Clubs was required to undergo the administrative proceedings provided in the

Act[7] before seeking federal judicial intervention (Appendix A, *infra*, pp. 3a-4a).

Following the convening of the statutory three-judge court, appellees SACB members agreed to adjourn all administrative proceedings pending the hearing and determination of the cause by that tribunal. This agreement remained in effect until the decision sought to be reviewed. When the SACB thereupon scheduled administrative hearings, appellants applied to the court below for an order staying them. The requested stay was unanimously granted on June 12, 1967.[8]

The complaint charged and appellants were prepared to prove by affidavits[9] and oral testimony that the threatened enforcement of the Communist-front provisions of the Act was for the sole purpose of discouraging and preventing appellants from exercising rights, privileges and immunities secured to them by the Constitution, and in particular, freedom of speech, assembly, press and association and the right to petition for redress of grievances. That

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[7] 50 U. S. C. 792.

[8] On June 15, 1967, the SACB, in view of the stay granted by the court below, issued an order vacating "the date of June 20, 1967, for beginning the hearings herein" and further ordered "that all further proceedings herein are postponed until further order of the Board."

[9] On August 12, 1966, appellants moved the three-judge Court for an interlocutory injunction. This motion was accompanied by many affidavits from officers of national civil rights and peace organizations attesting to the "chilling effect" of defendants' actions as well as those from DuBois Clubs officers and members indicating the immediate adverse consequences thereof on their own organizational activities. In view of the dismissal of the complaint by the court below, this motion was never acted upon.

appellees had virtually no hope of ultimate success is best illustrated by the Attorney General's frank admission, a month after the filing of the petition, that "one of the major purposes of the act" was to destroy affected organizations before administrative proceedings began.[10]

E. *The Questions Presented Are Serious and Substantial*

1. The Court below incorrectly held that appellant, DuBois Clubs, was required to exhaust its administrative remedies.

a. Should the opinion of the court below be sustained, a statute that "is a bill of attainder; that . . . imposes cruel, unusual and savage punishments for thought, speech, writing, petition and assembly; and that . . . stigmatizes people for their beliefs, associations and views about politics, law and government,"[11] will be beyond the remedial reach of federal district courts until affected organizations undergo the irreparable injury engendered by sustained administrative hearings and lengthy appellate review.[12] To force appellants to join the sorry ranks of the many organizations

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[10] *The Daily Princetonian*, April 6, 1966, pp. 1, 3, which, together with the Attorney General's press release referred to at p. 10 *infra*, was attached to appellees' motion below to dismiss the complaint.

[11] Dissenting opinion, Mr. Justice Black, *American Committee for Protection of Foreign Born* v. *SACB*, *Veterans of the Abraham Lincoln Brigade* v. *SACB*, 380 U. S. 503, 511.

[12] "But the allegations in this complaint depict a situation in which defense of the state's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury." *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965).

which, in the words of former Attorney General Nicholas De B. Katzenbach, "have collapsed" shortly after the initiation of SACB proceedings,[13] would be to abdicate the federal judicial responsibility so forcefully advanced by this Court only two terms ago in *Dombrowski* v. *Pfister*, 380 U. S. 473.

The court below, despite its candid recognition that "[T]he initiation of proceedings to require an organization to register under the Act may well present some practical problems in the area of free expression,[14] nevertheless refused to interfere with their commencement. By so doing, it eliminated any effective judicial forum for the meaningful resolution of what this Court itself has referred to as viable and important constitutional questions.[15]

The gravity of the questions posed by the lower court's renunciation of federal judicial *responsibility* as set forth in *Dombrowski* is underscored by its own acknowledgment of the "practical problems in the area of free expression,"[16] caused by the very initiation of SACB proceedings. As this Court observed in *Dombrowski*, "[T]he chilling effect upon the exercise of First Amendment rights may derive from

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[13] *The Daily Princetonian*, April 6, 1966, pp. 1, 3. "He [Mr. Katzenbach] indicated that most groups petitioned became defunct before any action could be taken."

[14] Appendix A, *infra*, p. 3a.

[15] *American Committee* v. *SACB*, *supra*, at 505. See also Mr. Justice Douglas' characterization of "important constitutional questions", in which he was joined by Associate Justices Black and Harlan (*ibid.* at 506), and identical language used by Mr. Justice Black (*ibid.* at 511). See also *The Registration of Communist Front Organizations; The Statutory Framework and The Constitutional Issues* (Note) 113 U. of Pa. L. Rev. 1270 (1965).

[16] Appendix A, *infra*, p. 3a.

the fact of the prosecution, unaffected by the prospects of its success or failure."[17] The fact that "Congress has made careful provision that no tangible sanctions can come into play until the facts have been explored in open hearing and the courts have scrutinized what they show. . . ."[18] is of small comfort to an organization destroyed long before this arduous route reaches its bootless destination.

b. The court below, in a judicial *tour de force*, came to the wholly untenable conclusion that this Court's decisions in *American Committee* and *Abraham Lincoln Brigade* "on the same day it decided *Dombrowski*"[19] justified the denial of judicial relief to appellants at this stage. Totally disregarding the crucial distinguishing fact that *American Committee* and *Abraham Lincoln Brigade* reached this Court "under the statutory review provided by Congress for registration orders entered by the Board after hearing,"[20] while *Dombrowski* arose, as did the instant litigation, before the institution of punitive procedures,[21] the court below erroneously assumed that remanding the earlier cases to SACB for fresh hearings constituted a fiat that SACB administrative procedures, no matter how demonstrably "chilling" their effect on First Amendment rights,

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[17] 380 U. S. at 487.

[18] Appendix A, *infra*, pp. 3a-4a.

[19] Appendix A, *infra*, p. 2a.

[20] Appendix A, *infra*, pp. 2a-3a.

[21] Although the court recognized, for its own purposes, "the patent differences between the two situations" (Appendix A, *infra*, p. 3), it pointedly ignored the fact that *American Committee* and *Abraham Lincoln Brigade* represented attempts to obtain a decent funeral for First Amendment rights while the purpose of *Dombrowski* was to prevent their death.

are beyond the reach of federal courts until after they have been completed.[22]

Not only does this conclusion fly squarely in the face of all logic, but it is in sharp conflict with the recent rulings of this Court in this area. In this connection, see *Dombrowski* v. *Pfister, supra; Greenwood* v. *Peaccock*, 384 U. S. 808, 829.[23] As this Court has often so clearly recognized,[24] most recently in *Keyishian* v. *Board of Regents*, 385 U. S. 589, "The threat of sanctions may deter . . . almost as potently as the actual application of sanctions." Moreover, the decision below completely ignores this Court's own determination that "our Communist Party decision on the Communist-action provisions did not necessarily foreclose petitioner's constitutional questions bearing on the Communist-front provisions." *American Committee* v. *SACB, supra*, at 505.

In essence, the court below is substituting for the abstention doctrine advanced by the *Dombrowski* district court

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[22] Parenthetically, the court below refused to act where only the enjoining of a federal agency was concerned while this Court in *Dombrowski*, in the face of the infinitely more delicate state-federal relationship partially symbolized by 28 U. S. C. 2283, ordered the district court promptly to frame "a decree restraining prosecution of the pending indictments against the individual appellants. . . ." 380 U. S. at 467.

[23] For cases in the lower court which have granted relief in this area without requiring exhaustion of remedies see *Reed Enterprises* v. *Corcoran*, 354 F. 2d 519, 522; *Carmichael* v. *Allen*, 267 F. Supp. 985, 993; *Stamler* v. *Willis*, 271 F. 2d 413; and *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817. Significantly, in neither of the latter two cases, both recent examples of the vitality of the *Dombrowski* concept, did the government seek certiorari from adverse rulings.

[24] *NAACP* v. *Button*, 371 U. S. 415, 433; *Dombrowski* v. *Pfister, supra*, at 486; *Baggett* v. *Bullitt*, 377 U. S. 360, 379.

what it considers a workable equivalent—the exhaustion of administrative remedies. Despite its own expressed misgivings and Mr. Katzenbach's concession that "most groups petitioned become defunct or dissolved before action could be taken," [26] it proclaims that "Congress has made careful provisions that *no tangible sanctions* can come into play until the facts have been explored in open hearing and the courts have scrutinized what they show, both in their adequacy to support a registration order and in their constitutional impact upon the statute itself." (Emphasis added.)[26]

Surely, the applicability of *Dombroswki* cannot depend on the semantics of exhaustion—administrative proceeding any more than it can rest upon those of abstention—criminal prosecution. If this Court has not, in the area of constitutionally protected expression, "required that all of those subject to overbroad regulations risk prosecution to test their rights," [27] *a fortiori,* it cannot compel those who face comparable dangers through punitive administrative proceedings to suffer the "substantial loss or impairment" [28] required by being subjected to them. For, as this Court has so sharply and powerfully enunciated in *Dombrowski,* "free

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[25] *The Daily Princetonian, supra,* p. 3.

[26] Appendix A, *infra,* pp. 3a-4a.
The court's careful use of the adjective *tangible* underscores its own realization of the adverse effect of the very administrative procedure with its omnipresent "threat of sanctions," *NAACP* v. *Button, supra,* which it makes a condition precedent of judicial responsibility.

[27] 380 U. S. at 486; *Keyishian* v. *University of New York, supra; Speiser* v. *Randall,* 357 U. S. 513.

[28] 380 U. S. at 486.

expression—of transcendent value to all society, and not merely to those exercising their rights—must be the loser." [29]

In blunt terms, the effect of the ruling below is to require the DuBois Clubs to endure a lengthy, expensive and extremely damaging hearing before the SACB before it may obtain any judicial consideration of its contention that the Act which so openly inhibits the exercise of First Amendment freedoms is invalid on its face. But as shown by the complaint, the affidavits, and by sad experience with the Communist-front provisions, affected organizations are destroyed by the very nature of the accusations and the proceedings.[30] As former Attorney General Katzenbach himself has pointed out, with rare exceptions, most of the affected organizations have been destroyed by the procedures, even in the absence of a final order.[31] Obviously, an administrative remedy which itself destroys the litigant is no remedy at all. If the statute is unconstitutional on its face, the DuBois Clubs should be permitted to obtain a court adjudication to that effect before and not after it

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[29] 380 U. S. at 486.

[30] Professor Chafee prophetically stated:

> "Just by filing a petition against any enterprise he [the Attorney General] dislikes, he can put it under a black cloud which will scare off contributions and force it to interrupt its normal activities in order to defend itself for months before the Board at the cost of thousands of dollars. This is enough to wreck almost any group even though it eventually escapes registration." The Blessings of Liberty (Lippincott & Co., Phila., 1956), at p. 155. See also The Registration of Communist-Front Organizations, *supra*, at 1289.

[31] "But, I suppose, in part, that [the destruction of affected organizations] was one of the major purposes of the Act." *The Daily Princetonian*, *supra*, at p. 3.

is destroyed or hopelessly crippled by protracted SACB proceedings. The position of the court below would in effect deny any court review now or ever, since the likelihood is that the DuBois Clubs, like so many other such organizations, will not survive them.

Indeed, even the court below recognized the serious and substantial nature of this problem. Accordingly, although it resolved the constitutional issue against appellants, it nevertheless unanimously stayed further proceedings before the Board, so as to permit the DuBois Clubs to present its contentions to this Court without going through the exhaustive Board hearings.

There are additional compelling reasons why this Court should now consider appellants' claim of facial unconstitutionality without requiring the DuBois Clubs to exhaust its administrative remedies. In the first place, on March 3, 1967, the Court of Appeals for the District of Columbia Circuit decided *Communist Party* v. *United States*, —— F. 2d ——, in which it held that the Communist Party cannot constitutionally be required to register in accordance with the order of the SACB.[32] It is, therefore, clear that if a registration order were in fact entered against the DuBois Clubs by the SACB it would not have to comply therewith and the order could not be enforced. In short, the proceeding against the DuBois Clubs would be a futility and would at the same time interfere with the exercise of its most fundamental rights. Under the circumstances, it should not be required to go through this futile

[32] The government did not petition to this Court for certiorari, thus acknowledging the correctness of the decision.

and destructive proceeding before being permitted to obtain an adjudication of its constitutional contentions.

Secondly, as a result of the decision of the Court of Appeals in the *Communist Party* case, *supra*, it is now beyond cavil that the Act is a bill of attainder against the DuBois Clubs or any other alleged Communist-front organization. When this Court sustained a registration order against the *Communist Party* v. *SACB*, 367 U. S. 1, it held that the order did not attaint the Party on the following grounds:

> "If the Party should at any time choose to abandon these activities, after it is once registered pursuant to §7, the Act provides adequate means of relief. As often as once a year it may apply to the Attorney General for cancellation of registration, and, in the event of his refusal to remove it from the register and to relieve it from the duty of filing annual statements, it may petition the Board for a redetermination of its amenability to the registration requirements of the Act, pursuant to a hearing, which, again, is subject to judicial review. §§13(b), (i), (j), (14a). Far from attaching to the past and ineradicable actions of an organization, the application of the registration section is made to turn upon continuingly contemporaneous fact; its obligations arise only because, and endure only so long as, an organization presently conducts operations of a described character" (at 87).

However, in *Jefferson School* v. *SACB*, 331 F. 2d 76, the Court of Appeals for the District of Columbia Circuit held that an organization accused of being a Communist-front may not litigate the issue of whether the Communist Party

is a Communist-action organization. Juxtaposing the *Communist Party* and the *Jefferson School* cases, it follows that a Communist-front organization is attainted by a registration order unless the Communist Party can, under the Act, relitigate its status on the ground that it has abandoned the activities which occasioned the order. But the redetermination provisions of the Act are available to the Party only if it has registered.[33]

It is now apparent that the Party has not registered, will not register and cannot constitutionally be forced to register. The only way in which the Party can take advantage of the redetermination section is after it surrenders its constitutional right not to register. Since neither the Communist Party nor any alleged Communist-front organization can litigate the current status of the Communist Party, the Act does apply "to the past and ineradicable actions of an organization" and the Act is therefore a bill of attainder against appellant DuBois Clubs.

Lastly, this Court upheld the constitutionality of the Communist-action provisions in *Communist Party* v. *SACB, supra*, on the basis of a Congressional finding made in Sec. 2 of the Internal Security Act concerning the nature of the world Communist movement. It recognized, however (at 113), that changed circumstances would require a different result. Whatever might have been the prevailing view concerning the findings of Sec. 2 when Congress made

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[33] Sec. 13(b) of the Act, 50 U. S. Code §792(b), referred to in the quotation from the *Communist Party* case in this Court, *supra*, provides that "Any organization *registered* [under the Act] . . . may . . . make application to the Attorney General for the cancellation of such registration. . . ." (Emphasis supplied.)

them in 1950,[34] its description of the world Communist movement is plainly anachronistic today. Statesmen and scholars alike recognize that the 1950 Congressional view of Communism as a monolithic world movement under iron Soviet discipline and control and dedicated to overthrow all free governments by criminal and conspiratorial means, has no resemblance to contemporary reality.[35]

All of these well-informed persons have recognized what is a matter of common knowledge and a proper subject for official or judicial notice, i.e., that there is no longer a monolithic world Communist movement, and that on the contrary, there are wide and substantial schisms between the Communist countries. Since the constitutionality of the Act is predicated upon a statement of facts which no longer exists, the statute cannot now be upheld. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153.

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[34] "Sec. 2. As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the would through the medium of a world-wide Communist organization."

[35] See, *e.g.*, Kennan, *Polycentrism and Western Policy*, Foreign Affairs, Jan. 1964, pp. 172, 174; Sen. Fulbright, *Foreign Policy, Old Myths and New Realities*, 110 Cong. Rec. 6227, 6228; Vice-President (then Sen. Humphrey) as quoted in the *Washington Evening Star*, Sept. 3, 1964; Sec. of State Rusk in a speech before the IUE-AFL-CIO, reported in the *Congressional Quarterly*, March 6, 1964, p. 479 and in an address to the New York Council on Foreign Relations, *New York Times*, May 25, 1966; Defense Sec. McNamara and Under-Secretary of State Katzenbach, as quoted in the *Washington Post*, Jan. 27, 1967, at p. A-7; Toynbee, *We Must Woo Red China, Saturday Evening Post*, July 17, 1965, at p. 10.

Obviously in view of all of these factors, appellant Du-Bois Clubs should not be required, as a prerequisite to having its eventual day in court, to undergo a long and arduous hearing before the SACB under this patently unconstitutional statute which may well result in the destruction of the organization and will, as a minimum, seriously impair the exercise by it and its members of transcendent First Amendment rights.

2. The federal statutes here challenged are violative of the Constitution of the United States on their face.

a. The statutes here under challenge are so broad in their sweep, so vague and nebulous in their definitions and characterizations of affected organizations and activities that they fail to meet the most minimal standards of the First and Fifth Amendments. *Wright* v. *Georgia,* 373 U. S. 284; *NAACP* v. *Button,* 371 U. S. 415; *Smith* v. *California,* 361 U. S. 147; *Winters* v. *New York,* 333 U. S. 507; *Herndon* v. *Lowery,* 301 U. S. 242; *Stromberg* v. *California,* 283 U. S. 359; *United States* v. *C. I. O.,* 335 U. S. 106; *Dombrowski* v. *Pfister, supra; Keyishian* v. *Board of Regents, supra; Baggett* v. *Bullitt,* 377 U. S. 360; and *Elfbrandt* v. *Russell,* 384 U. S. 11. Their sweeping command conflicts sharply with the fundamental guarantees of free speech, assembly, association and the right to petition for a redress of grievances. *Gibson* v. *Florida Committee,* 372 U. S. 539; *Cramp* v. *Board of Public Instruction,* 368 U. S. 278.

"This freedom-crushing law," as Mr. Justice Black has characterized it,[36] makes it possible for the SACB to de-

[36] 380 U. S. at 512.

termine whether any organization is a "Communist-front organization" by, *inter alia*, "the extent to which the position taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-actionist organization, Communist foreign government, or the world Communist movement. . . ." [37] This is precisely why former President Truman, in his veto message of September 22, 1950, referred to the Communist-front provisions as "the greatest danger to freedom of speech, press and assembly since the alien and sedition laws of 1798." [38]

Other sections of the statutes lend themselves to much the same analysis. Under Section 3(4), for example, an organization may be designated as a Communist-front if it is "primarily" operated for the purpose of giving aid and support to the Communist Party. Statutes containing equivalent language were invalidated by this Court in *Cramp* v. *Board of Public Instruction, supra,* and *Baggett* v. *Bullitt, supra.*

It would serve no useful purpose to point to other striking examples of the over-breadth of language of the chal-

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[37] 50 U. S. C. 792(f)(4). This definition is, of course, incorporated by necessity in the Communist-front provisions of the Act. Its application to the DuBois Clubs by the Attorney General is apparent in his attempt to dovetail the organization's alleged views with those purportedly held by the Communist Party (Appendix B, *infra,* pp. 10a-11a).

[38] H. R. Doc. No. 708, 81st Cong., 2d Sess., p. 6.
Mr. Katzenbach quite obviously shares Mr. Truman's low opinion of the Act. "It was an act that President Truman vetoed at the time it was passed, and I thought the veto was justified at the time that he did it. I don't know anything that's happened to make me change my mind about the act. *Of course, as long as it's on the books, it has to be enforced like any other law." The Daily Princetonian, supra* (emphasis added).

lenged statutes. In *Dombrowski* v. *Pfister, supra,* this Court disposed of similar Communist-front registration requirements as unconstitutional on their face.[39] While the designation standards under the invalidated Louisiana statutes[40] may vary from those here involved, that variance is in degree only.

b. The "Communist-front provisions of the Act further violate the constant insistence of this Court that where First Amendment rights are concerned, even though governmental design be legitimate and substantial, that purpose may not be pursued by means that broadly stifle personal liberties when the end may be more narrowly achieved. *Shelton* v. *Tucker,* 364 U. S. 479; *Lovell* v. *Griffin,* 303 U. S. 444; *Schneider* v. *State,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Talley* v. *California,* 362 U. S. 50.

A registration order issued under the Act's Communist-front provisions adversely affects the interest in organizational associations which is protected by the First Amendment. *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449; *Bates* v. *Little Rock,* 361 U. S. 516; *Communist Party* v. *SACB,* 367 U. S. 1, 90-91. Moreover, since these provisions condition the exercise of First Amendment rights on compliance with the statutory registration requirement, they squarely conflict with the First Amendment in this respect. *Thomas* v. *Collins,* 323 U. S. 516; *Lamont* v. *Postmaster General,* 381 U. S. 301.

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[39] 380 U. S. at 495-6.

[40] The Subversive Activities and Communist Control Law, La. Rev. Stat. §14:364(7).

The contention that this inhibition on the exercise of First Amendment rights may be justified on the ground that a Communist-front organization is substantially controlled by the Communist Party has no merit. The government lacks power to suppress the peaceable exercise of First Amendment rights by Communists as well as by everybody else. *DeJonge* v. *Oregon*, 299 U. S. 353; *Keyishian* v. *New York Board of Regents, supra.* Even statutes addressed to the advocacy of violence must be so limited as not to impair "legitimate political expression or association" of Communists. *Scales* v. *United States*, 367 U. S. 203, 229; *Elfbrandt* v. *Russell, supra.* Nor can the Act's destructive requirements be justified as a measure to disclose to the public who is "behind" an organization and its publications, since the First Amendment prevents the government from requiring the disclosure of the identity of those who write or distribute handbills. *Talley* v. *California, supra.*

It is obvious that the challenged "Communist-front" provisions are not statutes narrowly drawn to meet a specific problem, but, instead, are broadly drawn for the purpose of crippling the free exercise of First Amendment rights. As this Court reminded us in *Shelton* v. *Tucker, supra*, "the unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases."[41]

[41] 364 U. S. at 490.

CONCLUSION

This case urgently calls for the exercise of the appellate jurisdiction of this Court. The questions here presented are important not only to the appellants but far reaching in their impact upon decisive areas in our national life. The fundamental issue presented by this appeal—the determination of the invalidity of a law which Mr. Justice Black has characterized as "a wholesale denial of what I believe to be the constitutional heritage of every freedom-loving American" [42]—is the highest responsibility of the federal courts. Moreover, the relief sought by appellants, if it is to have any meaning whatsoever insofar as the DuBois Clubs is concerned, must be applied before the organization has, like its predecessors, been destroyed or hopelessly crippled. In essence, this is the lesson of *Dombrowski* and its progeny.

The decision below should be reversed, the complaint reinstated, and the relief prayed for granted.

Respectfully submitted,

DAVID REIN
711 Fourteenth St., N.W.
Washington, D.C.

MONROE H. FREEDMAN
1424 Sixteenth St., N.W.
Washington, D.C.

FLOYD MCKISSICK
414 West 149th Street
New York, N. Y.

WILLIAM M. KUNSTLER
ARTHUR KINOY
511 Fifth Avenue
New York, N. Y.

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y.

PATRICK SARSFIELD HALLINAN
345 Franklin Street
San Francisco, California

Attorneys for Plaintiffs-Appellants

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[42] Dissenting opinion, *American Committee* v. *SACB*, 380 U. S. at 512.

APPENDIX A

Opinion

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1087—66

W. E. B. DUBOIS CLUBS OF AMERICA, *et al.*,

Plaintiffs,

—v.—

NICHOLAS DEB. KATZENBACH, *et al.*,

Defendants.

Before:

PRETTYMAN, *Senior Circuit Judge,* and MCGOWAN, *Circuit Judge,* and BRYANT, *District Judge.*

PER CURIAM:

In March of 1966 the Attorney General of the United States petitioned the Subversive Activities Control Board for an order directing the W. E. B. DuBois Clubs of America to register as a Communist-front organization.[1] An

[1] The statute in question is the Subversive Activities Control Act of 1950, 64 Stat. 987-1005, 50 U. S. C. § 781-98 (1964). The particular provisions under attack are paragraphs (b), (c), and (d) of Section 7 of the Act, which provide for the registration of Communist-front organizations. 50 U. S. C. § 786.

answer was filed in which, among other things, the respondent DuBois Clubs (1) denied generally that it was a Communist-front organization within the meaning of the Act and (2) denied various allegations of fact made by the Attorney General in the petition. The Act contemplates that the issues so joined will be the subject of full evidentiary hearings; and that any registration order issued by the Board thereafter shall be subject to review in the first instance by the United States Court of Appeals for the District of Columbia Circuit, and ultimately by the United States Supreme Court on certiorari.

DuBois Clubs brought this suit in the District Court to dispense with the statutory procedure. It asks for a declaration that the registration provisions of the Act are unconstitutional; and it seeks injunctive relief against the Attorney General and the Board with respect to enforcement of them. After the convening of this three-judge court, the matter was heard on defendants' motion to dismiss the complaint for lack of subject-matter jurisdiction.

The issue raised by the motion is essentially whether this court should now determine the constitutionality of the challenged sections of the Act. At oral argument before us both sides appeared to be in agreement that a present holding of unconstitutionality was the premise of a denial of the motion, with subsequent proceedings in this court to be devoted only to evidence with respect to irreparable injury. DuBois Clubs' opposition to the motion relied heavily upon *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), where the Supreme Court held certain Louisiana subversive legislation invalid on its face and enjoined state criminal prosecutions under it.

On the same day it decided *Dombrowski*, however, the Supreme Court acted in the first two Communist-front cases

to reach it under the statutory review provided by Congress for registration orders entered by the Board after hearing. *American Committee* v. *SACB*, 380 U. S. 503 (1965); *Veterans of the Abraham Lincoln Brigade* v. *SACB*, 380 U. S. 513 (1965). The Court was there urged to declare the registration provisions unconstitutional; and the Court recognized the substantial nature of this claim in its cautionary comment that "[O]ur Communist Party decision on the Communist-action provisions did not necessarily foreclose petitioner's constitutional questions bearing on the Communist-front provisions. . . ." And see *Communist Party* v. *United States*, —— U. S. App. D. C. ——, —— F. 2d —— (decided March 3, 1967). The Court went on to say that, because of the staleness of the record made in the Board hearings, "decision of the serious constitutional questions raised by the order is neither necessary nor appropriate." It remanded the two cases to the Board for fresh hearings.

If the Supreme Court refused to decide the constitutional issues on a stale record, it would be anomalous for us to decide them on no record. The Supreme Court apparently saw nothing incongruous about reaching this result coincidentally with *Dombrowski;* and the patent differences between the two situations need no elaboration. The initiation of proceedings to require an organization to register under the Act may well present some practical problems in the area of free expression, but Congress has made careful provision that no tangible sanctions can come into play until the facts have been explored in open hearing and the courts have scrutinized what they show, both in their ade-

quacy to support a registration order and in their constitutional impact upon the statute itself.

The motion to dismiss is granted.

E. BARRETT PRETTYMAN
Senior Circuit Judge

CARL MCGOWAN
Circuit Judge

WILLIAM B. BRYANT
District Judge

APPENDIX B

Petition

IN THE

SUBVERSIVE ACTIVITIES CONTROL BOARD

Docket No. 126—66

NICHOLAS DEB. KATZENBACH, Attorney General of the United States,

Petitioner,

—v.—

W. E. B. DUBOIS CLUBS OF AMERICA,

Respondent.

On petition for an order requiring W. E. B. DuBois Clubs of America to register with the Attorney General, as required by Section 7(b), (c) and (d) of the Subversive Activities Control Act of 1950, as amended.

The Attorney General respectfully represents to the Subversive Activities Control Board that the W. E. B. DuBois Clubs of America was required under Section 7(b), (c) and (d) of the Subversive Activities Control Act of 1950, as amended, to register and file a registration statement with the Attorney General within thirty (30) days after its inception on or about June 21, 1964, as a Communist-front organization, and that it failed to do so and continues to fail to do so.

Pursuant to Section 13(a) of the Act, therefore, the Attorney General petitions this Board for an order, after

appropriate proceedings, directing the W. E. B. DuBois Clubs of America to register with the Attorney General as a Communist-front organization in the manner required by the Act.

In support of this petition, the Attorney General alleges the following facts, based on information and belief, relating to the character of the W. E. B. DuBois Clubs of America, as measured by the standards specified in the Act:

I.

From its inception on or about June 21, 1964, and continuing to the date of the filing of this petition, there has existed in the United States an unincorporated association known as the W. E. B. DuBois Clubs of America (hereinafter referred to as DCA or "organization"). This organization has its national office at 954 McAllister Street, San Francisco, California.

II.

Since 1919 there has been in continuous existence in the United States an organization known by various names, and which is now known as the Communist Party of the United States of America (hereinafter referred to as the Communist Party or Party). The Communist Party has been and is a Communist-action organization within the meaning of Section 3 of the Subversive Activities Control Act of 1950. The Board, after appropriate proceedings, found the Communist Party to be a Communist-action organization, and on April 20, 1953, ordered the Party to register as such with the Attorney General. The order became final on October 20, 1961, and notice of the fact that such order became final was published in the *Federal Register* on October 21, 1961, at page 9923.

III.

From its inception, DCA has been and is substantially directed, dominated and controlled by the Communist Party and has been and is primarily operated for the purpose of giving aid and support to the Communist Party. Pursuant to Section 13(f) of the Act, the following facts are respectfully submitted as illustrative of the above:

(1) The DCA came into existence under the plan, guidance and direction of the Communist Party, USA.

(a) In 1959, the Communist Party at its National Convention passed a resolution directed to the establishment of a national Marxist youth organization.

(b) Immediately following the 1959 National Convention of the Communist Party a program was adopted to implement the resolution directed to the establishment of a national Marxist youth organization and during 1960 under this program the Party appointed a National Youth Director and conducted meetings by Party leaders in such states as New York, Illinois, Minnesota and California in the planning and the promotion of a national organizing conference.

(c) From December 30, 1950 through January 1, 1961, Communist Party leaders and representatives actively participated in a national organizing conference which created the Progressive Youth Organizing Committee, an organization which served as a vehicle to bring into being the DCA.

(d) The decision to launch the national Marxist youth organization, which afterwards became known as the DCA, was made by the Communist Party in late 1963.

(e) DCA was established and organized under the direction and with the aid and support of the Communist Party, its leaders, members and representatives.

(f) Throughout various parts of the United States, members and officers of the Communist Party were assigned to attend the conference at which the DCA was founded, and to aid in the formation of the organization.

(g) Members and officers of the Communist Party directed the activities at the DCA founding Convention held in San Francisco, California on June 19 through 21, 1964.

(2) Since the formation of the DCA, up to and including the date of the filing of this petition, a substantial number of the persons who have been active in the management, direction, and supervision of the DCA have been active in the management, direction, and supervision of, and as representatives of the Communist Party. Through these persons the Party has guided and directed the affairs and activities of the DCA and has exercised direction and control over the formulation of the policies and programs of DCA. The following facts, among others, are illustrative thereof:

(a) A substantial number of officers of DCA throughout its existence have been and are leaders, members and representatives of the Communist Party and subject to its discipline.

(b) The Communist Party through its leaders, members, and representatives, has been active in the forma-

tion of chapters of the DCA, and in furnishing direction and guidance to the DCA.

(c) The affairs and policies of the DCA have been the subject of discussion at meetings of the Communist Party, and decisions of the Party governing these matters have been transmitted to the DCA.

(3) From its inception, DCA has received and continues to receive support, financial and otherwise, from the Communist Party, as illustrated by the following facts, among others:

(a) The Communist Party through its leaders, members, and representatives has furnished the leadership for the DCA, and through these individuals has supervised and advised, and continues to supervise and advise, DCA in its activities.

(b) The Communist Party contributed financial support to the DCA during the period it was being organized and has continued to contribute such support.

(c) The Communist Party has furnished speakers and lecturers for the respondent's meetings and other functions.

(d) At Communist Party meetings, and at other times and places, members of the Party have been urged and instructed to support the activities of the DCA; and, respondent's demonstrations, social affairs and activities have been supported by the Communist Party.

(e) The Communist Party has conducted classes in Marxism for members of the DCA and has supplied

literature to respondent for the education and indoctrination of its members in the principles of Marxism-Leninism.

(4) From its inception, up to and including the date of the filing of this petition, DCA has been and is primarily operated for the purpose of giving aid and support to the Communist Party, and to further and promote the Communist Party objective of developing a national Marxist youth organization as exemplified by, but not limited to, the following facts:

(a) DCA, in support of the Communist Party and its causes and objectives, has participated with and sponsored groups, organizations, protest marches, propaganda campaigns, picket lines, and has aided the Party in other ways.

(b) DCA has published and distributed a publication known as the "Spur" which contained articles and other writings supporting and urging support of Communist Party causes.

(c) DCA has printed, published and distributed such literature and propaganda material as policy statements, letters, organizational material, leaflets and other writings supporting and urging support of Communist Party causes.

(d) Through classes, training and indoctrination in Marxism-Leninism, DCA has prepared members for recruitment into the Communist Party.

(5) From its inception the DCA on matters of national and international affairs has uniformly adopted and sup-

ported the positions advanced by the Communist Party, and it has in no case deviated from them as illustrated by, but not limited to, the positions taken on nuclear testing, alleged colonial and neo-colonial exploitation, the institution of diplomatic relations with the Peoples Republic of China and with Cuba, the admission of China to the United Nations, the removal of the United States Naval Base from Guantanamo, and the lifting of travel restrictions to Cuba, China and North Vietnam.

WHEREFORE, your petitioner prays that the Board enter an order against the respondent, W. E. B. DuBois Clubs of America, requiring it to register as a Communist-front organization pursuant to Section 7 of the Act.

/s/ NICHOLAS DEB. KATZENBACH
Attorney General

/s/ J. WALTER YEAGLEY
Assistant Attorney General

/s/ ORAN H. WATERMAN
Attorney, Department of Justice

/s/ FRANCIS X. WORTHINGTON
Attorney, Department of Justice

/s/ ROBERT A. CRANDALL
Attorney, Department of Justice